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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JARED JIBBEN,

Plaintiff,

vs.

UNITED PARCEL SERVICE,

Defendant.

NO. CV-S-02-0039-DAE (RJJ)

**STIPULATED PROPOSED JURY
INSTRUCTIONS**

Trial: Sept. 6, 2005
Estimated Trial Time: 5 to 7 days

Pursuant to the schedule set forth at the July 7, 2005 pretrial conference, the parties, through their undersigned counsel, hereby submit the following proposed jury instructions for the trial on the above-referenced action.

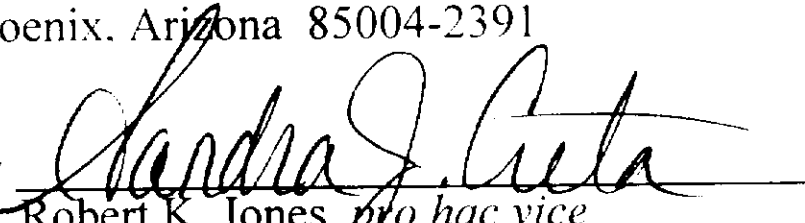
RESPECTFULLY SUBMITTED this 22 day of August, 2005.

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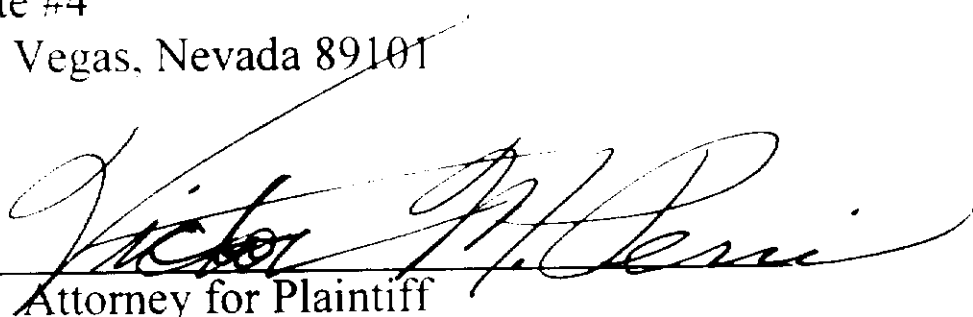
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6 By


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Attorney for Plaintiff

15
16
17 ORIGINAL AND ONE COPY filed with the
18 Clerk of the District Court on this the
____ day of August, 2005.
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I. **GENERAL FEDERAL JURY INSTRUCTION IN CIVIL CASES (COURT FORM INSTRUCTIONS)**

Duty of the Judge

Members of the Jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties. It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in this case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

Given _____
Modified _____
Withdrawn _____
Refused _____

1 **INSTRUCTION NO. 1**

2 **(Duty to Follow Instructions--Corporation is a Party)**

3 You, as jurors, are the judges of the facts. But in determining what actually happened in
4 this case -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow the
5 law I am now in the process of defining for you.
6

7 And you must follow all of my instructions as a whole. You have no right to disregard or
8 give special attention to any one instruction, or to question the wisdom or correctness of any rule
9 I may state to you. That is, you must not substitute or follow your own notion or opinion as to
10 what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the
11 consequences.
12

13 In deciding the facts of this case you must not be swayed by sympathy, bias or prejudice
14 as to any party. This case should be considered and decided by you as an action between persons
15 of equal standing in the community, and holding the same or similar stations in life. The law is
16 no respecter of persons, and all persons stand equal before the law and are to be dealt with as
17 equals in a court of justice. A corporation is entitled to the same fair trial at your hands as is a
18 private individual.
19

20 Given _____

21 Modified _____

22 Withdrawn _____

23 Refused _____

INSTRUCTION NO. 2**Excluding Argument Of Counsel**

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

INSTRUCTION NO. 3**Objections**

There are rules of evidence which control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered and the exhibit cannot be received.

Whenever I sustain an objection to a question, you must not speculate as to what the answer might have been or as to the reason for the objection. You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken from the record; such matter is to be treated as though you had never known of it.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

INSTRUCTION NO. 4**Excluding Statements Of Judge**

During the course of a trial I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he should respond to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

Given _____

Modified _____

Withdrawn _____

Refused _____

INSTRUCTION NO. 5**Judicial Notice**

The court may take judicial notice of certain facts or events. When the court declares it will take judicial notice of some fact or event, you may accept the court's declaration as evidence, and regard the fact or event which has been judicially noticed as conclusively proved.

Given _____

Modified _____

Withdrawn _____

Refused _____

INSTRUCTION NO. 6**Stipulation**

In this case, the parties have agreed, or stipulated, as to certain facts. This means that they both agree that these facts are true. You should therefore treat these facts as having been conclusively proved.

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Modified	_____
Withdrawn	_____
Refused	_____

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INSTRUCTION NO. 7

Depositions

Certain testimony has been read into evidence from depositions. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

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INSTRUCTION NO. 8

Interrogatories

During the course of the trial you have heard reference made to the word "interrogatory".
An interrogatory is a written question asked by one party of another, who must answer it under
oath in writing. You are to consider interrogatories and the answers thereto the same as if the
questions had been asked and answered here in court.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

INSTRUCTION NO. 9**Direct And Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Given _____

Modified _____

Withdrawn _____

Refused _____

INSTRUCTION NO. 10**Credibility Of Witnesses**

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the testimony. In weighing the testimony of a witness you should consider the witness' (1) relationship to the plaintiff or to the defendant, (2) interest, if any, in the outcome of the case, (3) manner of testifying, (4) opportunity to observe or acquire knowledge concerning the facts about which the witness testified, and (5) candor, fairness and intelligence. You should also consider the extent to which the witness has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Given _____

Modified _____

Withdrawn _____

Refused _____

INSTRUCTION NO. 11**Impeachment - Generally**

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something that is inconsistent with the witness' present testimony or failed to say or do something that would be consistent with the present testimony had it been said or done.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

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INSTRUCTION NO. 12

Reputation For Truthfulness

A witness may also be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided.

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Modified	_____
Withdrawn	_____
Refused	_____

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INSTRUCTION NO. 13

Corporation Responsible For Acts And
Declarations Of Its Agents And Employees

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by acts and declarations made while acting within the scope of the authority delegated by the corporation, or within the scope of the agent's or employee's duties to the corporation.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

INSTRUCTION NO. 14**Burden Of Proof – Multiple Claims**

In a civil action such as this, each party asserting a claim, as hereafter described, has the burden of proving every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

Where more than one claim is involved, as in this case, you should consider each claim, and the evidence pertaining to it, separately, as you would had each claim been tried before you separately; but in determining any fact in issue, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If a preponderance of the evidence does not support each essential element of a claim, then the jury should find against the party having the burden of proof as to that claim.

Given _____

Modified _____

Withdrawn _____

Refused _____

INSTRUCTION NO. 15**Duty To Deliberate**

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

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Withdrawn	_____
Refused	_____

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INSTRUCTION NO. 16

Damages Instruction Not Relevant To Liability

Of course, the fact that I have given you instructions concerning the issue of plaintiff's damages should not be interpreted in any way as an indication that I believe the plaintiff should, or should not, prevail in this case.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

INSTRUCTION NO. 17**Verdict Form**

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court. A form of verdict has been prepared for your convenience.

(Explain verdict)

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson. The foreperson will then contact the Courtroom Deputy via the telephone located in the hallway outside the jury room. The Courtroom Deputy will pick up the note and bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

Given _____

Modified _____

Withdrawn _____

Refused _____

II. STIPULATED JURY INSTRUCTIONS

INSTRUCTION NO. 18

Preliminary Instruction—ADA Employment Actions

The claim made by the plaintiff is based on a federal law known as the Americans with Disabilities Act, which will be referred to in these instructions as the ADA.

Under the ADA, an employer may not deprive a qualified individual with a disability of an employment opportunity because of the disability, if the disability does not interfere with the essential functions of the position. An employer who violates this statute may be liable for monetary damages. It is also unlawful for an employer to retaliate against an employee for making a complaint of discrimination or requesting an accommodation.

The plaintiff, Jared Jibben, seeks damages against the defendant, United Parcel Service (referred to herein as "UPS"), for intentional unlawful discrimination and retaliation under the ADA and the Nevada Civil Rights laws. UPS denies the plaintiff's claim.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 15.1 (as modified)

INSTRUCTION NO. 19**Conduct Of The Jury**

I will now say a few words about your conduct as jurors.

First, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case please let me know about it immediately;

Second, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it;

Third, do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own;

Fourth, if you need to communicate with me simply give a signed note to the bailiff to give to me; and

Fifth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide that case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 1.9

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INSTRUCTION NO. 20

No Transcript Available To Jury

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 1.10

INSTRUCTION NO. 21**Taking Notes**

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you so that you do not hear other answers by witnesses.

When you leave, your notes should be left in the jury room.

Whether or not you take notes, you should rely on your own memory of what was said.

Notes are only to assist your memory. You should not be overly influenced by the notes.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 1.11

INSTRUCTION NO. 22**Outline Of Trial**

The next phase of the trial will now begin. First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, the attorneys will make closing arguments and I will instruct you on the law that applies to the case.

After that, you will go to the jury room to deliberate on your verdict.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 1.12

INSTRUCTION NO. 23**Burden Of Proof—Preponderance Of The Evidence**

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 1.13

INSTRUCTION NO. 24**Cautionary Instruction—First Recess**

We are about to take our first break during the trial, and I want to remind you of the instruction I gave you earlier. Until the trial is over, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately. Do not read or listen to any news reports of the trial. Finally, you are reminded to keep an open mind until all the evidence has been received and you have heard the arguments of counsel, the instructions of the court, and the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to the bailiff to give to me.

I will not repeat these admonitions each time we recess or adjourn, but you will be reminded of them on such occasions.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 2.1

1 **INSTRUCTION NO. 25**

2 **Bench Conferences And Recesses**

3 From time to time during the trial, it may become necessary for me to talk with the
 4 attorneys out of the hearing of the jury, either by having a conference at the bench when the jury
 5 is present in the courtroom, or by calling a recess. Please understand that while you are waiting,
 6 we are working. The purpose of these conferences is not to keep relevant information from you,
 7 but to decide how certain evidence is to be treated under the rules of evidence and to avoid
 8 confusion and error.
 9

10 We will, of course, do what we can to keep the number and length of these conferences to
 11 a minimum. I may not always grant an attorney's request for a conference. Do not consider my
 12 granting or denying a request for a conference as any indication of my opinion of the case or of
 13 what your verdict should be.
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20 Given _____
 21 Modified _____
 22 Withdrawn _____
 23 Refused _____

24 **SOURCE:** Ninth Circuit Model Civil Jury Instruction, § 2.2
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INSTRUCTION NO. 26**Charts And Summaries Not Received In Evidence**

Certain charts and summaries that have not been received in evidence have been shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 3.9

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INSTRUCTION NO. 27

Use Of Notes

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 4.2

INSTRUCTION NO. 28**Communication With Court**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 4.3

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INSTRUCTION NO. 29

Elements Of ADA Employment Action

To establish a claim of disability discrimination under the ADA, the plaintiff must prove the following elements by a preponderance of the evidence:

1. The plaintiff has a disability within the meaning of the ADA:
2. The plaintiff was a qualified individual; and
3. The plaintiff's disability was a motivating factor in a decision to discharge the plaintiff's employment or otherwise discriminate against the plaintiff. It is not necessary for the plaintiff to prove that his disability was the sole or exclusive reason for the defendant's decision.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instructions, § 15.2

INSTRUCTION NO. 30**Nevada Law**

The plaintiff has also brought claims under the Nevada Civil Rights Act. The language of the Nevada statute is similar to the language of the ADA and the same standards and definitions that apply to the ADA also apply to the Nevada Civil Rights Act. Therefore, if you find that the defendant violated the ADA, then you should also find that the defendant violated the Nevada Civil Rights Act. If you find that the defendant did not violate the ADA, then you should also find that the defendant did not violate the Nevada Civil Rights Act.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Hirschhorn v. Sizzler Rests. Int'l, Inc., 913 F. Supp. 1393, 1398 (D. Nev. 1995).

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INSTRUCTION NO. 31

Discrimination

The Americans with Disabilities Act defines “discrimination” as not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer’s business.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: 42 U.S.C. § 12112 (b)(5)(A)

INSTRUCTION NO. 32**Disability Defined**

The first element of the ADA claim that the plaintiff must prove is that the plaintiff has a recognized disability under the ADA. A “disability” under the ADA is a physical or mental impairment, a record of physical or mental impairment, or being regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual.

The terms disability and physical or mental impairment include (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine, and (2) any mental or psychological disorder such as mental retardation, organic brain syndrome, emotion or mental illness, and learning disabilities.

Major life activities are the normal activities of living which a non-disabled person can do with little or no difficulty, such as caring for oneself, performing manual tasks, walking, sleeping, seeing, hearing, speaking, breathing, learning, engaging in sexual relations, reproducing, interacting with others, and working.

A limitation is substantial if the disabled person is unable to perform the activity or is significantly restricted doing so.

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1 Factors to consider in deciding whether a major life activity is substantially limited
2 include:

- 3 (1) the nature of the severity of the impairment;
4 (2) the duration or expected duration of the impairment; and
5 (3) the permanent or long-term impact of the impairment.
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17 Given _____

18 Modified _____

19 Withdrawn _____

20 Refused _____
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22 **SOURCE:** Ninth Circuit Model Civil Jury Instructions, § 15.3
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INSTRUCTION NO. 33

Corrected Or Mitigated Disability

To qualify as disabled under the ADA, the plaintiff must have an impairment that, when viewed in its corrected or mitigated state, substantially limits a major life activity. Methods used to correct or mitigate disabilities are not limited to artificial aids, like medications and devices.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 15.5

INSTRUCTION NO. 34**Effects of Medication**

In determining whether a person is disabled within the meaning of the ADA, it makes no difference whether the major life function is affected directly by the disability or indirectly by the side effects of the medication taken for a medical or physical condition.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Fehr v. McLean Packaging Corp., 860 F.Supp. 198, 200 (E.D. Pa. 1994); Guice Mills v. Derwinski, 967 F.2d 794, 797 (2nd Cir. 1992); Overton v. Reilly, 977 F.2d 1190, 1195 (7th Cir. 1992)

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INSTRUCTION NO. 35

Record Of Impairment

An individual has a “record of an impairment” if the individual “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1120-1121 (5th Cir. 1998).

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INSTRUCTION NO. 36

Regarded as Disabled

A person is "regarded as disabled" when (1) the employer mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) the employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more major activities.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Murphy v. United Parcel Service, Inc., 527 U.S. 516, 521-22 (1999).

1 **INSTRUCTION NO. 37**

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3 **Work As A Major Life Activity**

4 When the major life activity under consideration is that of working, the plaintiff must
5 prove, by a preponderance of the evidence, that the plaintiff was precluded from employment in a
6 broad class of jobs. The inability to perform a single, particular job does not itself constitute a
7 substantial limitation in the major life activity of working.

8 Other factors that you should consider when determining whether the plaintiff is
9 substantially limited in the major life activity of working include:
10

- 11 (1) the geographical area to which the plaintiff has reasonable access, and
12 (2) the number and types of jobs utilizing similar training, knowledge, skills or abilities,
13 within the geographical area, from which the plaintiff is also disqualified.
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19 Given _____
20 Modified _____
21 Withdrawn _____
22 Refused _____
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24 **SOURCE:** Ninth Circuit Model Civil Jury Instruction, § 15.4
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INSTRUCTION NO. 38**Qualified Individual**

The second element of the ADA claim that the plaintiff must prove is that the plaintiff is a qualified individual under the ADA.

The term qualified individual means an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. The individual must satisfy the requisite skill, experience, education, and other job-related requirements of the employment position.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 15.6

1 **INSTRUCTION NO. 39**

2 **Ability To Perform Essential Functions — Factors**

3 If you find that the plaintiff was qualified for the employment position, you must
4 determine, by a preponderance of the evidence, whether the plaintiff was able to perform all of
5 the essential functions of the employment position with or without a reasonable accommodation.
6

7 An essential function of an employment position means the fundamental job duties of the
8 employment position the plaintiff holds or desires. It does not include the marginal functions that
9 may occur through the course of a job.

10 You must consider the employer's judgment as to what functions of a job are essential. If
11 any employer has prepared a written description before advertising or interviewing applicants for
12 the job, this description is evidence of the essential functions of the job.
13

14 Other factors that may bear upon whether a job function is essential include, but are not
15 limited to:

- 16 1) whether the reason the position exists is to perform that function;
17 2) whether there are a limited number of employees available among whom the
18 performance of that job function can be distributed;
19 3) whether the job function is highly specialized, and the person in that particular
20 position is hired for his expertise or ability to perform the particular function;
21 4) the amount of time spent performing the job function; and
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1 5) the consequences of not requiring the individual holding the position to perform
2 the function;

3 6) the work experience of past employees who have held the position; and

4 7) the work experience of current employees that hold similar positions.
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19 Given _____

20 Modified _____

21 Withdrawn _____

22 Refused _____

23 **SOURCE:** Ninth Circuit Model Civil Jury Instruction, § 15.7 (as modified).
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1 **INSTRUCTION NO. 40**

2 **Reasonable Accommodation**

3 If you find the plaintiff qualified for the position but able to perform the job only with
4 some form of accommodation, then you must determine whether the defendant had a duty to
5 provide a reasonable accommodation.
6

7 To establish the defendant's duty to provide a reasonable accommodation, plaintiff must
8 prove, by a preponderance of the evidence, both of the following elements:

9 1. (a) the plaintiff informed the defendant of the need for an accommodation due to a
10 disability, or

11 (b) the defendant knew, or had reason to know:

12 (i) that the plaintiff has a disability;

13 (ii) that the plaintiff was experiencing workplace problems because of the
14 disability; and
15

16 (iii) that the disability prevented the plaintiff from requesting a reasonable
17 accommodation, and

18 2. the defendant could have made a reasonable accommodation that would have
19 enabled the plaintiff to perform the essential functions of the job.
20

21 Under the ADA, a reasonable accommodation by the defendant may include, but is not
22 limited to:

23 (1) modifying or adjusting a job application process to enable a qualified applicant
24 with a disability to be considered for the position;

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(2) making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

(3) job restructuring;

(4) part-time or modified work schedule;

(5) reassignment to a vacant position;

(6) acquisition or modifications of examinations, training materials or policies;

(7) provision of qualified readers and interpreters; or

(8) other similar accommodations for individuals with plaintiff's disabilities.

A reasonable accommodation does not include changing or eliminating any essential function of employment, shifting any of the essential functions of the subject employment to others, or creating a new position for the disabled employee.

If the plaintiff rejects a reasonable accommodation that is necessary to enable the plaintiff to perform the essential functions of the position, and plaintiff cannot, as a result of that rejection, perform the essential functions of the position, the plaintiff cannot be considered a qualified individual.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instructions, § 15.8.

1 **INSTRUCTION NO. 41**

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3 **Request for Reasonable Accommodation**

4 In order to request a “reasonable accommodation” under the ADA, an employee need not

5 specifically refer to the Americans with Disability Act or mention a “reasonable accommodation”

6 to trigger the employer’s obligation to accommodate the disabled employee. The employee need

7 only let the employer know that some adjustment or change is requested at work because of a

8 disability.

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15 Given _____

16 Modified _____

17 Withdrawn _____

18 Refused _____

19 **SOURCE:** EEOC Technical Assistance Manual (1992) at III-8; Buttermeyer v. Fort Wayne

20 Community Schools, 100 F.3d 1281, 1286 (7th Cir. 1996); Schmidt v. Safeway, Inc., 864 F.Supp.

21 991 (D. Or. 1994)

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INSTRUCTION NO. 42**Duty to Engage in an Interactive Process**

The law requires an employer and an employee to engage, in good faith, in an interactive process to determine whether a reasonable accommodation exists that would enable the employee to perform the essential functions of the position the employee holds or desires. If the employee fails or refuses to participate in this interactive process, then the employee is not entitled to recover against an employer for failure to reasonably accommodate.

Given _____

Modified _____

Withdrawn _____

Refused _____

SOURCE: Allen v. Pacific Bell, 348 F.3d 1113, 1115-1116 (9th Cir. 2003).

INSTRUCTION NO. 43

No Accommodation Required If "Regarded As" Disabled

An employer is not required to provide a reasonable accommodation to a plaintiff whose disability claim is based solely on being "regarded as" disabled.

Given _____
 Modified _____
 Withdrawn _____
 Refused _____

SOURCE: Kaplan v. City of N. Las Vegas, 323 F.3d 1226, 1232 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999).

INSTRUCTION NO. 44**Retaliation**

It is unlawful for a person or entity to discriminate against any individual because that individual has opposed any act or practice that he or she reasonably believes to be unlawful under the ADA or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.

Disability is not an element of a retaliation action under the ADA.

For the plaintiff to establish retaliation in violation of the ADA, the plaintiff must prove the following elements by a preponderance of evidence:

1. the plaintiff engaged in conduct protected under the ADA;
2. the plaintiff was subjected to an adverse employment action at the time, or after, the protected conduct occurred; and
3. the plaintiff's protected activity was a motivating factor in the defendant's adverse employment action. It is not necessary for the plaintiff to prove that the plaintiff's protected activity was the sole or exclusive reason for the defendant's decision.

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1 If you find that each of the elements on which the plaintiff has the burden of proof has
2 been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed
3 to prove any of these elements, your verdict should be for the defendant.
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19 Modified _____

20 Withdrawn _____

21 Refused _____

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23 **SOURCE:** Ninth Circuit Civil Jury Instructions, §15.10.
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INSTRUCTION NO. 45

“Adverse Employment Action” In Retaliation Cases

An action is an adverse employment action if it is reasonably likely to deter an employee from engaging in protected activity.

Given _____
Modified _____
Withdrawn _____
Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 12.4A.1.

INSTRUCTION NO. 46**Damages—Proof**

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff, you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following in determining the measure of damages:

The nature and extent of the injuries;

The mental, physical and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future;

The reasonable value of wages and benefits lost to the present time.

The reasonable value of wages, earnings and earning capacity which with reasonable probability will be lost in the future;

The plaintiff has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

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1 Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

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Given _____
Modified _____
Withdrawn _____
Refused _____

SOURCE: Ninth Circuit Model Civil Jury Instruction, §§ 7.1, 7.2

INSTRUCTION NO. 47**Damages--Mitigation**

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. that the plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 7.3

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2 **INSTRUCTION NO. 48**

3 **Back Pay**

4 If you determine the defendant discriminated against the plaintiff in terminating him, then

5 you must determine the amount of damages that the defendant's actions have caused the plaintiff.

6

7 You may award as actual damages an amount that reasonably compensates the plaintiff

8 for any lost wages and benefits, taking into consideration any increases in salary and benefits,

9 including pension, that the plaintiff would have received had the plaintiff not been discriminated

10 against.

11 You must reduce any award by the amount of the expenses that the plaintiff would have

12 incurred in making those earnings and by the amount that Jibben has earned since his

13 employment with UPS ended.

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20 Given _____

21 Modified _____

22 Withdrawn _____

23 Refused _____

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26 **SOURCE:** Federal Jury and Practice Instructions § 172.71 (5th ed.).

INSTRUCTION NO. 49**Punitive Damages**

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

The plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that defendant's conduct was malicious, or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety, rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law.

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2 If you find that punitive damages are appropriate, you must use reason in setting the
3 amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but
4 should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages,
5 you may consider the degree of reprehensibility of the defendant's conduct and the relationship of
6 any award of punitive damages to any actual harm inflicted on the plaintiff.
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16 Withdrawn _____
17 Refused _____
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20 **SOURCE:** Ninth Circuit Model Civil Jury Instruction, § 7.5
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2 **INSTRUCTION NO. 50**

3 **Punitive Damages: Defendant's Good Faith**

4 However, if you determine that the defendant's disability discrimination was contrary to

5 the defendant's good faith efforts to comply with the federal law forbidding disability

6 discrimination, the plaintiff is not entitled to punitive damages. In determining the good faith of

7 the defendant, you may consider whether, before the conduct in question, the defendant instituted

8 policies prohibiting discrimination, and trained its personnel to ensure equal treatment of disabled

9 individuals. On the issue of good faith, the defendant bears the burden of proof.

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19 Given _____

20 Modified _____

21 Withdrawn _____

22 Refused _____

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24 **SOURCE:** Kolstad v. American Dental Association, 527 U.S. 526, 542-45 (1999).

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Damages Arising In The Future—Discount To Present Cash Value

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill.

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Modified	_____
Withdrawn	_____
Refused	_____

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INSTRUCTION NO. 52

Return Of Verdict

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.

Given	_____
Modified	_____
Withdrawn	_____
Refused	_____

SOURCE: Ninth Circuit Model Civil Jury Instruction, § 4.4